

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

NOV -8 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0281-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
BRANDON OMAR BUCKLEY,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause Nos. CR200800283 and CR200800481 (Consolidated)

Honorable James L. Conlogue, Judge

REVIEW GRANTED; RELIEF DENIED

Edward G. Rheinheimer, Cochise County Attorney
By James Glanville

Bisbee
Attorneys for Respondent

Brandon Omar Buckley

Douglas
In Propria Persona

K E L L Y, Judge.

¶1 Following a jury trial, petitioner Brandon Buckley was convicted of second-degree murder and three counts of aggravated assault. The trial court sentenced him to consecutive, presumptive terms of imprisonment totaling 38.5 years, and it found

the aggravated assault convictions to be dangerous-nature offenses. We affirmed Buckley's convictions and sentences on appeal. *State v. Buckley*, No. 2 CA-CR 2009-0148 (memorandum decision filed May 5, 2010).

¶2 Almost six months after the mandate issued in Buckley's direct appeal, he filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., asserting the late filing was the fault of his attorney. *See* Ariz. R. Crim. P. 32.1(f) (failure to file notice of post-conviction relief within prescribed time without fault on defendant's part). The state moved to dismiss the notice as untimely. *See* Ariz. R. Crim. P. 32.4(a) (notice of post-conviction relief must be filed within thirty days after issuance of final order and mandate in direct appeal). In an apparent effort to determine whether summary dismissal under Rule 32.2(b) was appropriate, the trial court permitted Buckley to file a supplemental petition to substantiate the claim of actual innocence he had asserted in his notice of post-conviction relief. It appears the court misconstrued Rule 32.2(b), which directs a court to summarily dismiss a notice of post-conviction relief which does not set forth the specific exception for an untimely filing and meritorious reasons to support that exception, to mean that Buckley was required to set forth the meritorious reasons for his asserted claim of actual innocence.

¶3 The trial court considered Buckley's claim of actual innocence on the merits, but summarily dismissed it. In so ruling, the court found that Buckley's "claim is that . . . insufficient evidence . . . support[ed] his conviction. That claim was rejected on direct appeal. The Court finds no meritorious reason substantiating [Buckley's] claims." This petition for review followed. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶4 On review, Buckley contends the trial court abused its discretion by summarily denying his claims that he is innocent, the verdicts were against the weight of the evidence, the prosecutor improperly used DNA¹ evidence, and trial counsel was ineffective. He asserts he is entitled to a new trial or, at the very least, to an evidentiary hearing on these claims. But as the trial court noted, we previously rejected on appeal Buckley's argument that there was insufficient evidence to support his convictions. *See Buckley*, No. 2 CA-CR 2009-0148, ¶¶ 1, 8-16. Thus, we find the trial court properly rejected Buckley's claims that he was actually innocent and that the verdicts were against the weight of the evidence. Moreover, to the extent Buckley's petition for post-conviction relief presented claims he either raised on appeal (denial of motion for judgment of acquittal), or could have raised on appeal (prosecutorial misconduct), these claims are precluded. Under Rule 32.2(a), claims are precluded when they are based on any ground finally adjudicated on the merits on appeal or waived on appeal. And, nothing in the petition for review establishes that Rule 32.2(a) is inapplicable to Buckley's petition filed below or that he should be excused from that rule's preclusive effect.

¶5 Additionally, to prevail on a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance was prejudicial to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). Inability to show prejudice is fatal to a claim of ineffective assistance of counsel. *State v. Salazar*, 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992) ("If no prejudice is shown, the court need not inquire into counsel's performance."). Because

¹Deoxyribonucleic acid.

we rejected on appeal Buckley’s claim challenging the sufficiency of the evidence, we conclude his closely related claim of actual innocence—raised in the context of ineffective assistance of trial counsel—necessarily fails. We also reject Buckley’s claim that counsel’s conduct was somehow deficient based on counsel’s “personal interest” and “animosity issues.” We do not understand these arguments, nor has Buckley explained or supported them in his supplemental petition for post-conviction relief or on review.

¶6 Finally, a defendant is entitled to an evidentiary hearing only if he raises a colorable claim for relief which is one that, if taken as true, might have changed the outcome of the case. *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). No such claim was presented here.

¶7 Because we conclude the trial court did not abuse its discretion by denying Buckley’s petition for post-conviction relief, we grant the petition for review but deny relief.

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge